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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1004

BETHLEHEM STEEL CORPORATION,

Petitioner,

v.

GEORGE H. WILLIAMSON, JR., TIMOTHY SMITH, JAMES B. LINDSAY, EDWARD GREEN, JR., WILLIAM A. CLARK and VELVET BROWN, JR.,

Respondents.

REPLY BRIEF FOR PETITIONER BETHLEHEM STEEL CORPORATION

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Statement

Respondents' brief in opposition to Bethlehem's petition for certiorari conveys the false impression that this litigation involves present, systematic and admitted discrimination against black employees at Bethlehem's Lackawanna Plant and that such discrimination continues because the United States sought and obtained only limited relief in *United States* v. *Bethlehem*.*

These arguments constitute such a flagrant mischaracterization of the results achieved in the United States'

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* United States v. Bethlehem Steel Corp., 312 F. Supp. 977 (W.D.N.Y. 1970), *modified*, 446 F.2d 652 (2d Cir. 1971). The opinion of the court of appeals is set out at Appendix C-1 to Bethlehem's Petition. All citations to that opinion will be to that appendix, *e.g.*, C-1 at 653.

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action as to compel submission of this reply brief in order to clarify the following points:

(1) *United States* v. *Bethlehem* was a broad and vigorously prosecuted pattern-or-practice suit in which the Government obtained comprehensive relief for black employees at the Lackawanna Plant, including respondents. In that case, the court of appeals decided the maximum extent, consistent with safe and efficient operation of the Plant, to which the seniority and transfer provisions of the collective bargaining agreements between the Union and Bethlehem could be modified to provide relief from the continuing effects of past discrimination.

(2) Respondents' assertions that Bethlehem is presently pursuing intentional discriminatory practices at the Lackawanna Plant and has admitted such present discrimination are wholly unfounded and obviously designed to divert attention from the important legal issues and policy questions concerning the interpretation and administration of Title VII presented by Bethlehem's petition.

Argument

1. *United States* v. *Bethlehem.*

The Attorney General commenced *United States* v. *Bethlehem* on December 6, 1967, seeking not "limited relief" as argued by respondents, but rather ". . . an order enjoining the defendant . . . from engaging in any racially discriminatory employment practice . . ." including:

(1) discriminatory application of qualifying criteria for hiring, referring, transferring and assigning black employees vis à vis whites;

(2) referring and assigning black employees to less desirable jobs and white employees with similar or lower qualifications to more desirable jobs;

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(3) discrimination in the application of standards for admission to plant apprenticeship programs;

(4) discrimination in providing opportunities for advancement;

(5) engaging in any other discriminatory conduct as to recruiting, hiring, referral, transfer or assignments; and

(6) failing or refusing to take reasonable steps to correct the effects of past discriminatory practices (App. at 6-7*).

The complaint was amended on May 15, 1968, to join the United Steelworkers of America and five of its locals (the Unions) as defendants, alleging that "[c]ertain provisions of the collective bargaining agreements entered into between Bethlehem and the defendant unions perpetuate the effects of the discriminatory acts and practices of Bethlehem..." (App. at 11). The amended complaint sought to "... enjoin Bethlehem and the defendant unions . . . from failing or refusing to take all reasonable steps to alter the collective bargaining agreements so as to correct the effects of past racial discrimination..." (App. at 12).

Promptly after commencement of the suit, Bethlehem and the Attorney General conducted an intensive investigation into the facts of the alleged discrimination at the Lackawanna Plant. The Government was given an on-site office and provided with use of the Company's computer, accounting, duplicating and clerical employees. Extensive employee interviews were conducted and documents produced without recourse to subpoenas, depositions or interrogatories.

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* References are to the record in *United States* v. *Bethlehem* upon which respondents place sole reliance in their request for preliminary relief. Copies of the portions of the Appendix in that action which are referred to herein have been filed with the Clerk of the Court.

Exhaustive statistical studies were prepared on the racial distribution of employees at the Plant and various other subjects. Those joint investigations extended beyond the limits of even the broad amended complaint into areas such as Company-owned housing as well as schools and recreational facilities in the Lackawanna area.

After more than seven months of investigation, Bethlehem and the Government entered into a 78-page stipulation of fact in which Bethlehem conceded that black employees had in the past been discriminatorily assigned and had been denied equal advancement opportunities (App. at 21-98). At the same time, the Government conceded that these practices had ceased by October of 1967.

Two more months of investigation and negotiation produced a second stipulation of fact covering the provisions and operations of the existing collective bargaining agreements. Layoff, recall and transfer procedures which the Government proposed to modify were among the subjects covered by this stipulation (App. at 102-05).

Prior to trial, agreement was reached on the terms of the decree which was ultimately entered by the district court regarding all aspects of the broad relief originally sought by the Government except its proposed modifications of the seniority and transfer practices. The principal issue which remained for trial involved the extent to which the collective bargaining agreements should be modified, consistent with the safe and efficient operation of the Plant, in order to eliminate vestiges of past discrimination.

The case was tried over a period of nine days in November 1968 and January 1969 and a decision was rendered on April 13, 1970. The relief granted, embodying that previously agreed upon, included the following:

> (1) forbidding the assignment of black employees to eleven specified departments on a discriminatory basis;

(2) establishment of procedures to eliminate discriminatory standards for hiring, recall, assignment and transfer;

(3) independent validation of all employment screening tests and the electrical and mechanical tests to assure that they were job related and establishment of specific passing scores on tests which were administered;

(4) provisions for preferential transfer opportunities based on plant seniority for all employees previously assigned to the eleven predominantly black departments;

(5) granting of preferential rights to promotion to supervisory positions for qualified black employees and periodic review of the qualifications of those employees not already promoted;

(6) establishment of objective qualifications for supervisory positions;

(7) requirement of adequate notice of apprenticeship opportunities and the standards for admission to the program;

(8) provision for offering apprenticeships to black employees hired between January 1, 1964, and October 1, 1967, who met the standards applied to the least qualified white applicant accepted for the apprentice program during that period;

(9) institution of objective criteria for admission of electronic repair trainees and notification of all non-craft employees of those standards;

(10) special provisions for notice of and admission to the bricklayer apprentice program and brickmason craft positions;

(11) reduction of the number of labor pools to increase mobility under existing collective bargaining agreements;

(12) elimination of preferences in employment, assignment, transfer, recall or promotion based on relationship to employees;

(13) implementation of a recruiting program designed to assure minorities equal opportunity; and

(14) requirements that Bethlehem make periodic reports regarding various aspects of the decree in order that both the Government and the court might monitor Bethlehem's performance under the decree (C-4).

On appeal, the Government sought to add to this broad relief the right to rate retention for transferees and the use of plant seniority in their new jobs, both of which the district court had refused to allow. It argued initially that transferees be permitted the use of plant seniority for "all purposes" (U.S. Br. at 39). The Company opposed those proposals on the ground that such modifications of the collective bargaining agreement would have disastrous effects on the safety of all employees and on the continued economic viability of the Plant (Beth. Br. at 25-51). Thereafter, as discussed at pages 18-21 of the Petition, the Government acknowledged in its reply brief that use of plant service upon recall from layoff to displace incumbent employees was inappropriate because of the adverse impact that such "bumping" would have on the safety and efficiency of the Plant.

On June 21, 1971, the court of appeals granted substantially all the relief sought by the Government. Its considered decision as to the extent to which the transfer and seniority provisions of the collective bargaining agreements could be modified consistent with the safe and efficient operation of the Plant adopted the Government's

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view that use of plant seniority to "bump" incumbent employees upon recall from layoff was not consistent with either safety or efficiency, but that limited seniority carryover and rate retention for transferees were appropriate modifications.

The court of appeals apparently still harbored serious reservations about the potential impact the modifications of the bargaining agreements would have on the operations of the Plant. On its own initiative, it limited transfer rights under the Amended Decree as follows: "A transferee's right to transfer with seniority carryover and rate retention may be exercised only once, and only during the next two years." (C-1 at 666). Thereafter, the parties alerted the court of appeals to the fact that, as a result of the then in progress industry-wide negotiations of a new collective bargaining agreement, a substantial reduction in employment would occur which would limit the speed with which transfer opportunities would be available to black employees (Joint Motion for Clarification, July 16, 1971). With the consent of the parties, the court eliminated the two-year limitation it had previously imposed (C-3 at ¶ 5(a)(3)). Despite that explicit recognition by the court of appeals of the problems presented by the 1971 reduction in employment, respondents nonetheless bottom their right to relief in the instant case on the fact that this same reduction in employment frustrated the relief granted in *United States* v. *Bethlehem*.

Respondents' attempt to portray themselves and the broad class they purport to represent under Rule 23 (*i.e.*, all "black persons who have been, are employed or might be employed by Bethlehem Steel Corporation") as employees whose interests were not served by the Government is rendered absurd by the facts concerning the Government's handling of the case, including the extensive investigations and negotiations, the breadth of the relief sought and obtained by the United States, as well as the exhaustive trial and comprehensive appellate review. The issue of whether and to what extent the seniority and transfer

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provisions of the collective bargaining agreements could be modified to eliminate the effects of past discrimination and still preserve the safety and efficiency of the Plant was thoroughly explored by the Government and fully presented to and considered by the court of appeals. Respondents are not isolated employees whose rights were not adjudicated, but are members of the class of black employees on whose behalf the United States was successful in obtaining the very broad and comprehensive relief heretofore described.

2. *Present Discrimination.*

Respondents seem to assert that this action is an effort to eliminate presently existing discriminatory practices. They claim that Bethlehem is seeking "an irrevocable license to continue these discriminatory practices" (Br. in Opp. at 3-4) and that it is trying to "delay, as long as possible, the day when it will be forced to cease its discriminatory policies" (Br. in Opp. at 2). Moreover, they contend that the Company cannot dispute that the recall system is discriminatory because it was so "designed" (Br. in Opp. at 7).

These charges are completely answered by the record in *United States* v. *Bethlehem* (on which respondents rely exclusively) which conclusively establishes that Bethlehem ceased all discriminatory employment practices no later than October 1, 1967 (C-1 at 657, 658).

Respondents' attempt to cast this case in the mold of the classic southern mill discrimination cases is as misleading as respondents' assertions of present discrimination. This case is simply not analogous to cases such as *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968) (where white and black departments were maintained and overtly discriminatory transfer procedures which had no possible business necessity justification were used to defeat mobility for black workers), and *United States* v. *Local 189*, 282 F. Supp. 39 (E.D. La. 1968), 301 F. Supp. 906 (E.D. La.),

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aff'd, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970) (involving predominantly white and black lines of progression with a substantial pay differential and segregated white and black local unions with a white local having jurisdiction over access to the preferred white lines of progression).

Black employees at Lackawanna have never been placed in circumstances such as those discussed in the cases relied on by respondents. There has always been a percentage of black employees at the Plant which is greater than the black population in the Lackawanna area, and those employees have never been relegated solely to menial labor jobs, but have occupied jobs at all levels in the Plant, including those requiring skill and imposing substantial responsibilities. As the record in *United States* v. *Bethlehem* reveals, no substantial economic disparity existed despite the admitted discriminatory practices prior to October 1967. In 1970 * the average hourly earnings of black employees in the eleven predominantly black departments was 96.7% of that of employees in the other 63 departments of the Plant—$4.014 as compared with $4.149 (Ex. G-7). Among employees hired from 1955 to 1970, the black employees hired earned on the average only 2% less than the whites hired (Ex. G-7).

Moreover, the transfer and seniority system established by industry-wide negotiations, has always been racially neutral. In particular, the recall system at Lackawanna, unlike the practices described in *Quarles* and *Local 189*, is designed to promote the safe and efficient operation of the Plant by returning employees from layoff to the departments in which they have accumulated years of experience in difficult and dangerous jobs. Respondents' alternative to this system—which was rejected by both the Government and the court of appeals in *United States*

* 1970 is the last year for which statistics exist in the record of *United States* v. *Bethlehem*.

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v. *Bethlehem*—would permit inexperienced employees from other departments to occupy those jobs, producing the "unsettling effects of seniority carry-over during periods of layoff and recall" which the court of appeals found necessary to avoid (C-1 at 664).

Respondents' ill-founded efforts to associate Bethlehem with hard-core forms of discrimination and their attempt to minimize the significance of the Government's prior suit are obviously intended to obscure the serious issues of law and policy questions presented by Bethlehem's petition. Respondents' inflammatory remarks should not divert attention from the principal point presented to this Court—that the future efficacy of Title VII depends upon according the usual legal attributes of finality to judgments rendered in comprehensive pattern-or-practice suits brought by the United States.

Conclusion

Accordingly, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit should be granted.

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